

STATEMENT OF PAUL HOFFMAN, DEPUTY ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS, OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, CONCERNING S. 2319, TO AUTHORIZE AND FACILITATE HYDROELECTRIC POWER LICENSING OF THE TAPOCO PROJECT.

APRIL 27, 2004

Mr. Chairman, thank you for the opportunity to present the Department of the Interior's views regarding S. 2319. This bill would authorize and facilitate hydroelectric power re-licensing of the Tapoco Project, near Great Smoky Mountains National Park.

The Department supports S. 2319 with the amendments discussed later in this testimony. We believe that the exchange authorized in S. 2319, together with the comprehensive Settlement Agreement discussed later in this testimony, is an excellent example of Secretary Norton's 4 C's, Conservation through Cooperation, Consultation and Communication and demonstrates how environmental groups, local and state governments, industry, tribes, and the Federal government can work cooperatively on the conservation of important environmental resources.

S. 2319 would resolve a jurisdictional issue by allowing the Federal Energy Regulatory Commission (FERC) to issue a new license to Alcoa Power Generating Inc. (APGI) to operate its existing Tapoco Project (FERC project # 2169), a system of four hydropower dams on the Little Tennessee and Cheoah rivers straddling the North Carolina-Tennessee border. The bill also authorizes the Secretary to exchange lands within Great Smoky Mountains National Park (park) with APGI. Once the exchange is completed, the bill allows FERC to re-license the project. The Secretary and the Secretary of Agriculture are

also authorized to acquire title to additional lands that may be transferred to a nongovernmental organization, as part of the Settlement Agreement related to this project, and add them to the boundaries of the park or the Cherokee National Forest.

In 1999, when APGI began work on a re-licensing application with FERC to continue the operation of the Tapoco Project, it was discovered that a portion of the project, known as Chilhowee Reservoir, inundates approximately two miles of government-owned lands along Abrams Creek and shorter segments along three other streams, all within the 1926 authorized boundary of the park. This situation has existed since the 1950's when Chilhowee Dam was completed and originally licensed by the former Federal Power Commission. FERC does not have the legal authority to issue licenses for hydropower projects that flood lands within authorized national park boundaries.

The Federal Power Act and the enabling legislation for the park specifically prohibit hydropower projects within the park. The historical record, from the 1950's and earlier, of how the licensing was allowed to occur is unclear. Records indicate that the NPS and the Federal Power Commission were aware of the jurisdictional defect, but no evidence has been found that proves that the issue was legally resolved. It appears that the Federal Power Commission granted the license and the decision was not challenged.

S. 2319 would resolve this situation by requiring a transfer of approximately 100 acres of submerged lands along Abrams Creek, and three smaller tributaries within the park, to APGI and granting jurisdiction to FERC to re-license the Tapoco Project and the

operations at Chilhowee Dam and Reservoir. In exchange, the park would receive fee title to 186 acres of forested uplands within its authorized boundary that are currently under APGI ownership and retain management and enforcement rights over the 100 acres transferred to APGI. The bill also contains a reversionary clause that stipulates if the dam is ever breached or removed, the submerged lands would revert to the NPS.

The exchange would extend park-owned land to the east shoulder of U.S. Highway 129 for approximately three miles. Currently, park-owned land stops at a powerline easement well to the northeast of the highway. This gap between the highway and the powerline creates an isolated pocket of land within the park boundary that poses ongoing management and law enforcement problems. Because of the reserved management easement, NPS rangers would continue to patrol the four flooded creek embayments within the park and enforce park rules, even though the underlying fee interest in the land will now belong to APGI.

Critical to our support of this bill are additional conservation provisions in a comprehensive Settlement Agreement that has recently been developed among APGI, the Department of the Interior, the U.S. Forest Service, Tennessee and North Carolina natural resource agencies, the Eastern Band of Cherokee Indians, local governments, and several nongovernmental organizations. The Settlement Agreement has widespread support from the involved parties and will be filed with FERC to address the issues in the re-licensing of the Tapoco Project, including whether or not Chilhowee should continue to operate as a reservoir.

In addition to the land exchange proposed in S. 2319, under the Settlement Agreement APGI will donate to The Nature Conservancy (TNC) a permanent conservation easement on an additional 400 acres of land it owns in Tennessee, within the park's authorized boundary, but lying southwest of Highway 129 and the previously mentioned 186-acre parcel. These lands will continue to be maintained as a wildlife management area under an existing agreement with the State of Tennessee until such time as they might be acquired by the NPS. APGI will also grant an option to TNC to buy the fee interest of this tract for a price reflecting impact on value of the donated easement, and TNC will be restricted from selling the tract to any entity other than the NPS.

In addition to the land exchange provisions in S. 2319, the Settlement Agreement also stipulates that APGI will donate conservation easements to TNC for several other parcels of land. The first permanent conservation easement is on approximately 5,500 acres of land that will be the centerpiece of a "conservation corridor" linking the park with the Cherokee National Forest, immediately south of the project's reservoirs on the Little Tennessee River. TNC will hold the easement and the property will be available for purchase in fee for future addition to the Cherokee National Forest or the park, as appropriate.

The second conservation easement is on approximately 4,000 more acres of APGI lands in Tennessee and would last for the term of the new FERC license. If APGI decides to sell these lands or to sell the project to a different company, it has agreed to make these

lands available for purchase by TNC. Through in essence a right of first refusal, TNC would only be authorized to sell these lands to the Tennessee Wildlife Resources Agency, the U.S. Forest Service or the park.

Finally, APGI has agreed to establish a mitigation fund for the project area in Tennessee that will make \$100,000 per year available to the NPS, the U.S. Fish and Wildlife Service, the U.S. Forest Service, TNC, the State of Tennessee, and other stakeholders for actions to mitigate the ecological impacts of the hydroelectric project, such as reducing invasive, non-native, terrestrial and aquatic species, improving wildlife habitats, and conducting relevant ecological research. A similar, but smaller mitigation fund (\$25,000 per year) will be established for projects on the North Carolina portion of the project. APGI will also restore biologically important minimum stream flows to sections of the Little Tennessee River and the Cheoah River that have been bypassed for the last 50 years for power generation.

We should note that an appraisal has not been done on the lands to be exchanged. The value of these lands would normally be determined through an objective appraisal conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA). However, we are mindful that legislated land transfers often promote other considerations that may not lend themselves readily to the standard appraisal process or to equal value exchanges in all cases. In this instance, NPS conveys approximately 100 acres of land to APGI and receives in return a reservation of a conservation easement on the 100 acres of land, a reversion interest on the 100 acres of

land, and 186 additional acres of land or suitable equivalent. Conservation provisions also are provided for in the related Settlement Agreement. For these reasons, this exchange results in environmental, management, energy-related and economic benefits for the parties and the public. The balancing of important public policy considerations against the financial implications of proposed transfers are ultimately a question that rests with Congress.

We also have several amendments to suggest. Section 4(c) provides for the reversion of fee simple title to the United States. We would like to work with the Committee, APGI, and other interested parties to address several issues in this subsection. First, the provision requires reversion for fee simple title for the Chilhowee Dam, and we believe the intention of the provision is to require the reversion of the lands identified in Section 4(a)(2), not the dam itself. Second, we would like to discuss with the parties further refinement of the circumstances under which reversion of fee title should occur.

Section 4(g) of the bill states, among other things, that the exchange is deemed to meet the requirements of the National Environmental Policy Act of 1969 and the National Historic Preservation Act. The Department does not believe this broad exemption is necessary. Much of the environmental compliance work necessary to implement the exchange has already been conducted. We therefore recommend striking these provisions from the bill.

In addition, we suggest one technical amendment that will make the land acquisition authority in Section 6(a)(2) of the bill consistent with that in Section 4(f). The amendment is attached to this testimony.

S. 2319, which will authorize the re-licensing of the Tapoco Project, and the accompanying Settlement Agreement together provide a solution that makes sense, helps protect ecosystem sustainability within the Southern Appalachians, and is widely supported by the involved agencies and groups. We look forward to working with the committee to help this bill move forward.

Mr. Chairman, this concludes my statement. I would be pleased to answer any questions you or other members of the subcommittee may have.

Proposed Amendment

S. 2319, Tapoco Project Licensing Act of 2004

In Section 6(a)(2)(A) insert the following after “under paragraph (1)”:

“and administer any acquired land as part of the Park in accordance with applicable law
(including regulations)”